BAHAROM v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Hill and Good JJ.A.)
May 14, 1960]

[Johore Bahru — F.M. Criminal Appeal No. 6 of 1960]

Criminal Law and Procedure — Insanity — Defence of — Burden of proof — Evidence relating to mental condition — Evidence Ordinance, 1950, s.114 ill. (g) — Penal Code, s.84.

Evidence — Witness not called by defence — Admissibility of letters exchanged between accused and deceased.

It is for the defence to call any witness whose evidence is directed to the issue of insanity and the duty of the prosecution is limited to supplying the defence with a copy of any report or statement of any prison medical officer who can give evidence on that issue and to making such person available as a witness for the defence.

In this appeal the accused was convicted and sentenced to death for the murder of a young man. At one stage or another the defence knew that the Principal Officer, Pudu Jail, the Medical Officer in Charge of Prisons and the Medical Superintendent at Tanjong Rambutan were in a position to give evidence if called upon as to the accused's state of mind.

Held: it was for the defence to call such of these witnesses as they saw fit and if they did not do so that was a fair subject of comment by the trial Judge in his direction to the jury.

The other ground of appeal related to the admissibility in evidence of certain letters which were tendered at the trial. Some of these letters were written by the accused to the deceased and some of them were written by the deceased to the accused. The effect of these letters was opened to the jury. They were told that the accused and the deceased wrote letters to one another in endearing terms and the prosecution alleged there was thus disclosed more than mere friendship. They were said to afford a motive which was alleged to be jealousy.

Held: as regards the letters written by the accused to the deceased and whatever their bearing on the cause of death, they were admissible for what they were worth. They were rightly admitted although they could have had little effect on the trial one way or another.

Cases referred to:—

(1) *Sodeman* v. *R.* [1936] 2 All E.R. 1138; [1936] W.N. 190.

(2) *R.* v. *Carr-Briant* [1943] 1 K.B. 607, 610; [1943] 2 All E.R. 156.

(3) *R.* v. *Casey* 32 Cr. App. R. 91.

(4) *Goh Ah Yew* v. *Public Prosecutor* [1949] M.L.J. 150.

COURT OF APPEAL, appeal from Selangor High Court.

Dato' R. P. S. Rajasooria for the appellant.

Pawan Ahmad bin Abdul Rashid (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was tried before Mr. Justice Adams and a jury for the murder of a young man Jamaluddin in contravention of section 302 of the Penal Code. He was convicted and sentenced to death and he has now appealed against his conviction.

There is no question that the dead boy was killed, and very brutally killed, by the appellant who inflicted no less than 16 stab-wounds upon his person. At the trial although the appellant did not admit the killing he did not deny it. Defences of self-defence and provocation were put forward. What the defence mainly relied upon was the defence of insanity, that is to say it was sought to bring the case within the exception to the Penal Code contained in section 84, the effect of which has to be carefully borne in mind:

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

The case was summed up to the jury in considerable length and with great care by the learned trial Judge and a great deal of what he said in his summing-up particularly with reference to the defences of self-defence and provocation has not been criticised before us.

Before us the appeal has been argued on two main grounds. One of these grounds relates to the way in which the defence of insanity was dealt with by the trial Judge. The other ground relates to the admissibility in evidence of certain letters which were tendered at the trial, some of which were admitted and some of which were not admitted. With regard to the question of insanity, in the first place it is said that having regard to what was said in the case of *Sodeman* v. *The King*[1] as discussed in the later case of *Rex* v. *Carr-Briant*[2] the Judge's direction to the jury was erroneous not so much on the onus but on the quantum of proof.

Now what the trial Judge actually said was this (and he said it twice). In the first place he said:—

"before you can bring in a verdict of not guilty, because the accused is insane, you must be satisfied on the probabilities that the accused at the time he committed the offence by reason of unsoundness of mind was incapable of knowing the nature of his act or if he did know the nature of his act that he did not know what he was doing was wrong or contrary to law."

At a later stage he repeated it in slightly different words:—

"I would remind you that it is the duty of the defence to satisfy you, before you can bring in a verdict of not guilty on this ground, that on the probabilities the accused at the time he killed this boy was suffering from a disease of the mind and by reason of unsoundness of mind he was incapable of knowing the nature of the act or what he was doing was wrong or contrary to the law."

In our view these passages say just what was said in *Sodeman's case* and later in *Carr-Briant's case.*

Then it was said that having given that direction the trial Judge misdirected the jury by saying that he could find no evidence at all of insanity.

At an earlier stage he had very properly reminded them that they must not be bound in any way by any expression of opinion on his part as to the evidence. Then he said that there was no evidence that the father of the accused was an epileptic. Perhaps that statement was not altogether accurate if it be accepted that having what is called a fit is necessarily evidence of

epilepsy, but one thing is clear that at no time throughout the trial did any witness lay or medical mention the word "epilepsy" nor was there any expert evidence before the Court to say that epilepsy either can or must cause unsoundness of mind which is the expression used in the Penal Code. What the trial Judge clearly had in mind was that such medical evidence as there was was all in favour of the appellant being sane and that, as he pointed out, there was in existence some other evidence relating to the mental condition of the accused in the evidence of the Superintendent of the Mental Hospital at Tanjong Rambutan, presumably some sort of an expert, but it was for the defence to call that evidence and if they did not do so the jury might safely draw the unfavourable inference provided for by section 114(g) of the Evidence Ordinance, that is to say that if called it would be unfavourable to the accused.

We have listened to a great deal of discussion on the point. For ourselves we see no reason to differ from the judgment of the Court of Criminal Appeal in the case of *Casey*[3]. We are not overlooking the argument addressed to us based on our own decision in the case of *Goh Ah Yew* v. *Public Prosecutor*[4]. That case, however, is hardly in point. In fact it is very difficult to see that it has any relevance at all. The point in that case was that the prosecution had relied on section 114(g) of the Evidence Ordinance to suggest that the evidence of a witness who was not called by the defence would not have corroborated the evidence of the appellant himself. To our minds, however, that has no bearing at all on a case where insanity is raised as a defence in a criminal case, because in such a case there is an onus on the defence, that is to prove that the accused was insane.

Having said that, I return to *Casey's case*. With respect, we accept what was decided in that case and we say here that it is for the defence to call any witness whose evidence is directed to the issue of insanity and that the duty of the prosecution is limited to supplying the defence with a copy of any report or statement of any Prison Medical Officer who can give evidence on that issue and to making such person available as a witness for the defence. At one stage or another the defence knew that the Principal Officer, Pudu Jail, the Medical Officer in charge of Prisons and the Medical Superintendent at Tanjong Rambutan were in a position to give evidence if called upon as to the accused's state of mind. It was for the defence to call such of these witnesses as they saw fit and if they did not do so that was a fair subject of comment. We find therefore that there is no cause for complaint as regards the trial Judge's summing-up on this point.

There remains the question of the letters. In fact there were in existence letters some of them written by the accused to the deceased and some of them written by the deceased to the accused all of which were tendered in evidence. The effect of these letters was opened to the jury. They were told that accused and deceased wrote letters to one another in endearing terms and the prosecution alleged there was thus disclosed more than mere friendship. They were said to afford a motive which was alleged to be jealousy.

In due course these letters were tendered and were proved to be in the handwriting of the deceased and of the accused respectively. At one stage the Judge was disposed to admit, and indeed said he would admit, the letters written by the deceased but on pressure from counsel for the appellant who seems to have conducted the defence with very great spirit he changed his mind and he decided that they should not be admitted on the ground that they did not refer to the cause of death of the deceased person who had written them. He thereupon made a note that in his opinion (and we would agree with him) no harm had been done because the letters had neither been shown nor read to the jury.

As regards the letters written by the accused these were letters in his own handwriting addressed to the person whom he subsequently killed and whatever their bearing on the cause of death (and the trial Judge was at some pains to make it clear that in his opinion they had very little bearing) they clearly were admissible for what they were worth and indeed their admissibility was not objected to by the defence at the trial. They were rightly admitted although in our view they could have had little effect on the trial one way or another in view of what the Judge said in his summing-up to the jury.

In all the circumstances of the case we think there is no course open to us but to dismiss the appeal, which we do.

Appeal dismissed.

CHAN TONG v. REGINA

[C. C. A. (Rose C.J., Tan Ah Tah and Wee Chong Jin JJ.) June 8, 1960]

[Singapore — Criminal Appeal No. 2 of 1960]

Criminal Law — Murder conviction — Non-direction on provocation — Substitution of verdict of culpable homicide not amounting to murder — Abuse or scolding words — Whether amount to provocation.

If a person is tried on a charge of murder, and there arises on the whole of the evidence the question whether or not the offence might be culpable homicide not amounting to murder only on the ground of provocation or any other ground, then, whether the defence has relied on it or not the Judge must put the question to the Jury.

In this case the appellant, who was charged with, and convicted of, murder, had alleged that he was seated in his room eating his evening meal when the deceased and several members of her family congregated outside his door and scolded him in respect of the previous evening's episode. The deceased according to the appellant, challenged him to come outside his room to meet her husband. The appellant also alleged that he was physically assaulted and thereby he committed the alleged offence under grave and sudden provocation, but the prosecution case was that there was no provocation at all. The learned trial Judge in his direction to the Jury said, "Mere words cannot in law ever amount to provocation, members of the Jury. The accused's case,